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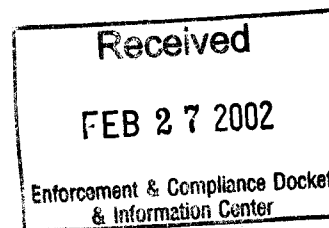
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**By Hand Delivery**

U.S. Environmental Protection Agency  
Enforcement and Compliance Docket and  
Information Center (Mail Code 2201A)  
Attention: Docket No. EC-2000-007  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460



**Comments on EPA's Proposed "Cross-Media  
Electronic Recordkeeping and Reporting Rule" (CROMERRR)**

Dear Sir/Madam:

Enclosed for filing in Docket No. EC-2000-007 are an original and three copies of the Comments of the Utility Air Regulatory Group (UARG) on EPA's August 31, 2001 Proposed Electronic Recordkeeping and Reporting Rule. 66 Fed. Reg. 46162. Please call me at (202) 778-2248 if you have any questions regarding these comments.

Sincerely,

Lauren E. Freeman

**UNITED STATES OF AMERICA  
ENVIRONMENTAL PROTECTION AGENCY**

**40 C.F.R. Parts 3, 51, *et al.*  
Establishment of Electronic Reporting;  
Electronic Records; Proposed Rule.  
66 Fed. Reg. 46162.**

**Docket No. EC-2000-007**

**COMMENTS OF THE  
UTILITY AIR REGULATORY GROUP  
(UARG) ON EPA'S AUGUST 31, 2001 PROPOSED  
"CROSS-MEDIA ELECTRONIC RECORDKEEPING  
AND REPORTING RULE" (CROMERRR)**

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**COMMENTS OF THE  
UTILITY AIR REGULATORY GROUP  
(UARG) ON EPA'S PROPOSED CROMERRR**

**I. Introduction**

On August 31, 2001, the United States Environmental Protection Agency (EPA or the Agency) issued a rulemaking proposal -- sometimes referred to as the proposed "Cross-Media Electronic Recordkeeping and Reporting Rule" (CROMERRR) -- to establish criteria for use of electronic recordkeeping and reporting to satisfy requirements under EPA programs. 66 Fed. Reg. 46162. According to the preamble and other EPA public statements, the intent of EPA's proposal is to "remove existing regulatory obstacles" to use of electronic recordkeeping and reporting in existing EPA rules and offer sources the option of maintaining and submitting records in electronic format consistent with criteria in the proposal. EPA's preamble and other documents also make clear that EPA's analysis of its proposal is dependent upon an assumption that any costs associated with complying with the rule would be undertaken voluntarily by a source (presumably after determining that there were sufficient benefits to the specific source).

These comments are submitted on behalf of the Utility Air Regulatory Group (UARG). UARG is a nonprofit, ad hoc group of more than 40 electric generating companies (and organizations) and four national trade associations (the Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, and the National Mining Association). UARG's purpose is to participate collectively on behalf of its members in EPA rulemakings and other Clean Air Act proceedings that affect the interests of electric generators and in litigation arising from those proceedings. UARG appreciates the opportunity to comment on this proposal and to participate in EPA's public meetings on the issue. UARG believes that the Agency's willingness to receive additional input and to work with regulated entities is essential to understanding the true impacts of EPA's proposal.

UARG supports EPA's intent to remove regulatory obstacles to use of electronic recordkeeping and reporting and to otherwise encourage paperless technologies. However, UARG does not believe that the proposed rule is consistent with the EPA's stated intent and analysis, or the governing statutory and regulatory criteria. Although EPA's rulemaking record reflects some effort by the Agency to identify and analyze existing electronic recordkeeping and reporting requirements, EPA's analysis does not reflect actual practices of the utility industry, or the existing EPA requirements to which they are subject.

As a result, UARG believes that EPA's proposal, rather than removing obstacles, will create obstacles to use of electronic records and formats by adding burdensome and expensive criteria that would have to be met in order to maintain current practices and comply with existing rules. As such, EPA's proposal would offer few (if any) incentives for additional use of electronic records. That result is clearly inconsistent with EPA's stated intent. Moreover, EPA's failure to accurately identify the true impacts and costs of its proposed rule creates a fundamental flaw in the current proposal that can only be cured by withdrawal and, if deemed appropriate, reproposal. As discussed below, UARG believes that EPA can accomplish its goal of encouraging use of paperless technologies, and fulfill its obligations under the Government

Paperwork Elimination Act (GPEA), through more flexible approaches that would not impose unreasonable costs.

## **II. Status Of Electronic Recordkeeping And Reporting By Electric Utilities Under Several Clean Air Act (CAA) Programs.**

In the January 3, 2002, *Federal Register* notice announcing the scheduling of several public meetings on recordkeeping issues, EPA asks a series of questions regarding the impacts of its proposal on companies, including soliciting information about companies' current electronic recordkeeping and reporting practices. 67 Fed. Reg. 278. UARG members are subject to numerous regulations requiring the collection and recordation of volumes of data and the submittal of information to EPA. Over the years, UARG members have invested significant resources in creation of internal systems to manage those data -- in many cases relying on electronic media for the creation, revision, and storage of information to support compliance with EPA rules.

The regulations to which UARG members are subject represent the full range possible requirements with respect to creation and submission of electronic records. Although there are a few regulations that include language specifically requiring use of paper records or "hardcopy" submissions, there are also many regulations that require creation and maintenance of electronic records, either through explicit rule language or by requiring use of technologies (such as continuous emissions monitors and other measurement equipment) that only produce data in electronic format. In some cases, those records are allowed or required to be submitted to EPA (or a state) electronically. Where there is no express language regarding the form of records or submissions, UARG believes that the vast majority of regulations can be, and in some cases already have been, interpreted by EPA, states, and industry as allowing use of electronic records where practicable, as long those records can be printed in hardcopy format (or otherwise made available) for inspection.

In response to EPA's request, the following provides a summary of a few of the electronic recordkeeping and reporting provisions applicable to electric utilities under the Clean Air Act (CAA).

### **A. The Acid Rain Program And NO<sub>x</sub> Budget Programs**

Among the most advanced regulations affecting electric utilities on the issue of electronic recordkeeping and reporting are the regulations implementing the Acid Rain Program under 40 C.F.R. Parts 72-78, and more specifically the regulations under Part 75. Part 75, which was promulgated to address monitoring and reporting of emissions under the Acid Rain Program, is also used to satisfy emission monitoring and reporting requirements under the Federal NO<sub>x</sub> Budget Program (NBP) (40 C.F.R. Part 97) and under many state NO<sub>x</sub> mass emission reduction programs (40 C.F.R. Part 96). Part 75 explicitly requires use of continuous emission monitoring systems (CEMS) that include an "automated data acquisition and handling system" (DAHS) to "measure and record" emission values. *See, e.g.,* 40 C.F.R. § 75.10. In addition to recording raw data points from the CEMS and calculating hourly averages, the DAHS is also used, among other things, (1) to generate databases of historical data that are used to calculate and record "substitute" data that are recorded and reported during periods when data from the CEMS are

invalid or lost, *see* §§ 75.30 - 75.37, (2) to store other data and operating information required to be recorded under §§ 75.57 - 75.59 and perform other required calculations, and (3) to generate records in “electronic formats” specified by the Administrator pursuant to § 75.64(d) that are submitted to EPA in electronic quarterly reports. *See* Part 75, Appendix A, Section 4 (specifications for Part 75 DAHS).

Although EPA initially allowed these DAHS-generated records to be submitted on electronic media (*e.g.*, diskette), starting in April, 2001, EPA’s rules have required that the electronic records generated by the DAHS be submitted “by direct computer-to-computer electronic transfer via modem and EPA-provided software” (unless otherwise approved by the Administrator). § 75.64(f). It is only in those cases where EPA has determined that information are “incompatible” with electronic reporting, that EPA’s rules specifically require maintenance and submission of “hardcopy” information. *See, e.g.*, §§ 75.60 - 75.64.

These requirements for generation and submission of electronic quarterly reports have not been easy to implement. Since promulgation of Part 75 in 1993, utilities have spent hundreds of thousands of dollars to develop, or procure from vendors, computer software to meet EPA requirements. EPA’s instructions for development and use of the specified “electronic formats” are several hundred pages long, and have been subject to frequent change to correct errors and/or implement revisions to rules and policies. *See, e.g.*, Revised EDR Version 2.1 Reporting Instructions, Clean Air Markets Division (CAMD), U.S. EPA (January 24, 2001).<sup>1</sup>

Significantly, the DAHS required under Part 75 is not required to include the type of programming that would be necessary to meet the criteria proposed for electronic records under CROMERRR. Although EPA has over the years developed various policies regarding manual editing of data stored in and generated by the Part 75 DAHS, *see, e.g.*, Revised EDR Version 1.2 Reporting Instructions at 9-13 (January 24, 2001), EPA has never even proposed to require software to track changes. Given the complexity of the record requirements, requiring utilities to track changes and access to records would result in creation of volumes of largely useless additional electronic records as reports are revised to correct formatting and other errors. To support implementation of this very complex electronic recordkeeping and reporting program, EPA has even created and provided to utilities software -- EST-FTP Version 1.1 and Monitoring Data Checking (MDC) Version 4.0 -- designed to identify errors in data and formatting and allow manual editing of those data to meet EPA’s formatting requirements. If utilities deem it appropriate to make changes to records that are not covered by such policies, utilities generally “petition” EPA to approve the change and, where necessary, request permission to “resubmit” the revised data. *Id.*

As with other CAA programs, Part 75 utilizes a certification process to ensure the “truth, accuracy, and completeness” of data submissions and to verify compliance with rule requirements. Under the Acid Rain Program, those certifications are required to be made by a “designated representative” (DR) meeting the definition in 40 C.F.R. § 72.2 and identified to EPA in a “certificate of representation.” § 72.21(a). Each submission to EPA must be certified

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<sup>1</sup> The EPA instructions and software referred to in these comments are available on the CAMD’s website at <http://www.epa.gov/airmarkets>.

by the DR based on a standard of "reasonable inquiry." § 72.21(b). Thus, under the Acid Rain Program, rather than proscribing specific software or criteria to control access to data, the regulations place on the DR the responsibility to ensure that there are systems in place to assure the validity of required records (whether electronic or paper) and to prevent fraud. When EPA moved to electronic submission of quarterly reports under Part 75, EPA addressed the certification process by allowing DR's the option of submitting a paper certification of the electronic submission or including the certification statement in the electronic submission. See § 75.64(g); Revised EDR v2.1 Instructions for 900-level Record Types (RT).<sup>2</sup>

Although the DR bears responsibility for ensuring that reports are submitted, EPA has not interpreted its rules as requiring the DR to be the one who "actually submits" the report. Quarterly reports are submitted to EPA's mainframe computer (at EPA's National Computer Center) via an EPA-supplied Windows-based software package. In order to submit data to EPA via the internet, EPA also requires the use of security procedures, "Check Point VPN-1 SecuRemote" software, and SecuRemote passwords.<sup>3</sup> DR's obtain passwords by submitting (via electronic mail) a written request to register him/her-self or, as is more commonly the case, one or more staff members who will perform the submissions on their behalf, as an authorized user. Upon that request, EPA assigns a personal EPA user ID and initial mainframe password and registers the user for installation of the SecuRemote software. Although UARG members are required under Part 75 to follow the procedures specified by EPA, UARG members have objected to the current procedures -- which do not meet the requirements proposed under CROMERRR -- as being unnecessarily burdensome.<sup>4</sup>

As an alternative, EPA also accepts electronic mail submissions of quarterly reports for users who are temporarily unable to successfully use the ETS-FTP and SecuRemote software. EPA accepts those submissions from DRs or their authorized staff. Use of the electronic mail backup has proven very important given the technical issues many user have experienced resolving problems getting data through firewalls and other issues. *See, e.g.,* <http://www.epa.gov/ntsd/securemote/faqs.html>. Electronic mail backup has also proven necessary as a result of several instances of unavailability of EPA's mainframe computer due to

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<sup>2</sup> In June, 2001, EPA proposed revisions to Part 75 that would eliminate the option of submitting a "hardcopy" certification. 66 Fed. Reg. 31978, 31994. UARG has objected to that proposed revision. *See* Comments of the Utility Air Regulatory Group on EPA's June 13, 2001 Proposed Revisions to 40 C.F.R. Parts 72, 75, 78, and 97 (EPA Air Docket No. A-2000-33).

<sup>3</sup> *See* ETS-FTP 1.1 Users' Guide, CAMD, U.S. EPA (May 22, 2001).

<sup>4</sup> Concerns about the impact of these problems on utilities' ability to meet report submission deadlines as well as concerns about the cost of keeping up with EPA revisions to electronic reporting formats, instructions, and policies -- which can require expensive revisions to DAHS software -- lead UARG to challenge the lawfulness of EPA's 1999 rule revision making electronic "computer-to-computer" submission of reports mandatory. *See Appalachian Power Co. v. EPA*, Docket No. 99-1302 (D.C. Cir. filed July 23, 1999). That lawsuit is currently being held in abeyance pending settlement discussions.

computer virus or other security concerns within EPA. The process for registering users and submitting reports are also described on the CAMD's website.

Quarterly reports are not the only submissions made electronically under the Acid Rain Program. DRs are also allowed to submit Part 75 electronic monitoring plan and CEM test data electronically via electronic mail or using the newly created MDC-FTP software. To submit via MDC-FTP, EPA requires that the DR request a "token" -- an encrypted file uniquely associated with the DR or a staff member authorized by the DR to make the required submissions on his/her behalf. In addition, EPA has also recently launched a new on-line system for transferring "allowances" of SO<sub>2</sub> under the Acid Rain Program and NO<sub>x</sub> under the NBP. The "On-line Allowance Transfer System" (OATS) is an internet application that allows participants in those allowance markets to record their own transfers under 40 C.F.R. § 73.50 and § 97.60 either by entering data on screen or by submitting an "XML" file. See <http://www.epa.gov/airmarkets/transfer/press.html>. Although the rules do not specifically authorize such electronic submissions, EPA has apparently interpreted them as not prohibiting them.

Part 75 contains many other recordkeeping and reporting requirements, some of which refer to "written notice." EPA's summary of the Part 75 submission requirements (including identification of submissions currently required to be made electronically) is available on the CAMD's website. In at least one case, EPA has explicitly stated in the rule that submission of "written notices" by electronic mail is allowed as long as the respective state or EPA office agree that the form is acceptable. Submission of Part 75 notices are governed by a definition of "submit" in 40 C.F.R. § 72.2. That definition allows submission not only in person or by U.S. Postal Service, but also "[b]y other equivalent means of dispatch, or transmission, and delivery" -- an option EPA has apparently interpreted as encompassing electronic methods. The definition also makes clear that compliance with any "submission" deadline is "determined by the date of dispatch, transmission, or mailing and not the date of receipt." 40 C.F. R. § 72.2 (emphasis added). The definitions in § 72.2 also make clear that "receipt" includes the possession of information sent "by authorized electronic transmission."

EPA also has interpreted the requirement for "written" records to be compatible with electronic recordkeeping. In June, 2001, EPA proposed to revise a Part 75 requirement for maintenance of a written "Quality Assurance/Quality Control Plan" (QA/QC Plan) for CEMS to explicitly allow that the information be "stored electronically" as long as the information can be made available in hardcopy upon request. See 66 Fed. Reg. 31978, 31994 (proposed revisions to Part 75, Appendix B, Section 1). Electric utilities could benefit from similar EPA guidance and interpretations for other notice requirements in the Acid Rain Program rules, provided they did not impose burdens that would not be encountered with paper records or submission. UARG objects to any rule -- like the proposed CROMERRR -- that would increase the burdens of current electronic reporting requirements under these programs.

## **B. New Source Performance Standards (NSPS)**

In addition to the Acid Rain Program rules, many UARG member sources are also subject to New Source Performance Standards (NSPS), some of which also require the electronic recording of emissions data from CEMS. See, e.g., 40 C.F.R. §§ 60.7(f), 60.45(a), 60.47a. In those cases where CEMS are required, electronic data systems (like the Part 75 DAHS) are used



to reduce those data to hourly averages and to maintain related information. Data from those systems are reported either quarterly or semi-annually, depending upon the particular regulation.

Although some NSPS provisions addressing submission of reports and some NSPS notice requirements include language that could have been interpreted as prohibiting electronic submission, EPA has already promulgated revisions to the rule to explicitly allow optional electronic reporting where approved by the applicable state (which generally has authority to implement and enforce the NSPS). In February of 1999, EPA promulgated revisions to 40 C.F.R. § 60.7(a) to explicitly allow electronic submission of certain notices “if acceptable to both the Administrator and the owner or operator of a source,” and to § 60.19(b) to allow use of “alternative means of delivery, including the use of electronic media” for submissions with explicit “postmark” deadlines, if approved by the permitting authority. *See* 64 Fed. Reg. 7458 (1999). In addition, in at least one subpart, EPA has revised the relevant provision to explicitly allow submission of reports electronically provided the permitting authority approves the alternative format. *See, e.g.,* § 60.49a(j) (Subpart Da). To the extent EPA believes there are any remaining obstacles to electronic recordkeeping and reporting under the NSPS, EPA could promulgate similar revisions or issue interpretative guidance.

### **C. Title V Operating Permit Programs**

All of the CAA requirements affecting electric utility sources must also be incorporated into operating permits that are issued by states under EPA-approved programs meeting criteria in 40 C.F.R. Part 70, or by EPA under 40 C.F.R. Part 71. Although these “Title V” rules generally do not impose new substantive requirements, they do include requirements for submission of periodic reports addressing requirements in the permit. Under Parts 70/71, the source must designate a “responsible official” (RO), meeting the definition in the applicable rule, to submit and “certify” these periodic emission, deviation, and compliance reports. *See, e.g.,* 40 C.F.R. § 70.5(d).

Although the Part 70/71 rules do not explicitly refer to source’s use of electronic records or electronic submission, some rules have been interpreted by EPA and states as allowing use of those formats. For example, in the preamble to the final Part 71 rule, EPA explicitly states that electronic forms could be used for permit applications submitted to EPA under that Part. *See* 61 Fed. Reg. 34202, 34207, 34215 (1996). The Part 70 rules also require that states make available to EPA any information obtained or used in administration of their program in “computer-readable files to the extent practicable.” 40 C.F.R. 70.4(j)(1). As a result, at least one state (Texas) is currently encouraging submission of Part 70 permit applications electronically,<sup>5</sup> and another state (Ohio) is requiring that Part 70 permit applications be prepared using specific software and electronically transferred to the state.<sup>6</sup> To the extent there are obstacles in the Part 70/71 rules to other uses of electronic records and methods of electronic submittal, electric utilities and states could benefit from guidance or rule revisions to remove those obstacles.

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<sup>5</sup> *See* <http://www.tnrc.state.tx.us/permitting/airperm/opd/electsub/electsub.htm>.

<sup>6</sup> *See* [http://www.epa.state.oh.us/dapc/title\\_v/titlev.html](http://www.epa.state.oh.us/dapc/title_v/titlev.html).

However, to be useful, any such action would need to be careful not to create additional hurdles for RO certifications or to impose additional costs on companies or states.

### **III. Description Of EPA's CROMERRR Proposal And Its Failures.**

EPA's CROMERRR proposal is divided into two parts. The first part sets out, in Subparts A - D of a new Part 3 to 40 C.F.R., EPA's proposed criteria for treatment of electronic recordkeeping and reporting under EPA programs. The second part of the proposal consists of amendments to provisions in a handful of existing rules to address states' compliance with the new Part 3 in implementing those particular rules.

Subpart A of the proposed Part 3 sets out the scope of the rule. Rather than amend existing EPA rules to incorporate Part 3, as EPA proposes to do for state-implemented programs, EPA attempts to directly amend all program rules involving creation or submission of documents to EPA through Part 3 itself. EPA never explains from a legal perspective how this generic rule can be effective in revising specific language in existing individual rules that require use of "hardcopy" records or already authorize use of electronic records without undergoing rulemaking to change the language in those individual rules. The idea that EPA could promulgate a rule overriding language in numerous existing rules without ever revising the affected rules to reflect the change (or even specifically identifying the rules that have been changed) is a disturbing prospect under administrative law principles.

Nonetheless, proposed § 3.1 establishes that Part 3 applies to any electronic documents or reports submitted or maintained by regulated entities to satisfy requirements of an EPA program. Proposed § 3.2 then provides that use of "electronic records" or "electronic documents" to satisfy EPA program requirements is permitted only if the following two conditions are met: (1) the record or document meets the relevant criteria in Part 3, and (2) EPA has "published a notice in the Federal Register announcing that EPA is prepared" to recognize the record and/or receive the document in electronic format. EPA defines the term "*electronic record*" to include virtually any information in digital form that has passed through a "computer system." The term "*electronic document*" is defined more narrowly to include only those documents that are "submitted" to an agency or third party as an "electronic record" and "communicated via a telecommunications network."<sup>7</sup> With respect to use of electronic records or electronic documents under state programs, in addition to the amendments applying the new Part 3 criteria to specific state programs, EPA's proposal requires states to seek and obtain approval of changes to the state's environmental program that demonstrate compliance with criteria in Subparts C and D of the proposed rule.

Although EPA's proposed language does purport to authorize the use of paperless technologies where they are not already allowed, the more significant effect is to prohibit almost any use of computers in satisfying EPA recordkeeping and reporting requirements until EPA publishes an announcement for the specific part or subpart (or EPA approves a state's revised

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<sup>7</sup> This definition was specifically drafted to exclude documents submitted on electronic media, like diskettes, or via facsimile. 66 Fed. Reg. 46163.

program), and the rule criteria for those records and documents are satisfied.<sup>8</sup> Because companies are already using computers and electronic media to create, maintain, and in some cases submit information to EPA, the proposal would effectively make unlawful many companies' current practices. EPA's proposal also specifically states that it is not authorizing the conversion of existing paper records to electronic form -- a practice that has also become common with the advance of digital imaging software (like that create by Adobe to scan or convert records into ".pdf" format). Proposed § 3.1(b). This preclusion would not only make those current practices unlawful, it would require that entities following CROMERRR keep two record retention systems - a paper system for pre-promulgation records and an electronic system for post-promulgation records. EPA does not explain why conversion of paper records to electronic media through mechanisms like digital imaging should be prohibited.

Significantly, EPA's rule makes no distinction between the voluntary use of electronic records/documents and use that is already required under EPA rules (like those described above). The only exclusion in EPA's proposed rule is to state that the rule has no effect on specific requirements for paper records that take effect on or after the effective date of the rule. Proposed § 3.2(d). This provision, which presumably was included to allow EPA the option of revising regulations to reinstate prohibitions on use of electronic records that were purportedly removed by CROMERRR, only amplifies the significant practical issues faced by regulated entities attempting to interpret regulations on their face. Under EPA's proposal, one would not know whether an explicit requirement for use of paper or "hardcopy" records, or an authorization for use of electronic formats, was valid without knowing when the rule "took effect" and, for pre-CROMERRR rules, whether EPA has issued the required *Federal Register* notice.<sup>9</sup> EPA also provides no explanation of how the *Federal Register* notice requirement applies to rules that already authorize or require use of electronic records or reports, other than to say that it was EPA's intent that all rules would be covered under CROMERRR unless explicitly exempted.

Subpart B sets out EPA's proposed requirements for submittal of acceptable "electronic documents" to EPA. Entities submitting documents directly to EPA would satisfy the requirements of EPA's proposal (1) by successfully "submitting" the report to EPA's Central Data Exchange (CDX) or to an alternative receiving system "designated by the Administrator," and (2) for any document required by rule to bear a signature when in paper format, by including an "electronic signature" meeting EPA's proposed criteria. Proposed § 3.10. In this

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<sup>8</sup> Although EPA's proposal does not appear to be intended to prohibit use of electronic media, such as diskettes, for submission of documents, UARG presumes that even that method of submission might have to be preceded by compliance with CROMERRR, since one could not keep a record of the original submission without triggering EPA's proposed electronic recordkeeping requirements. As a result, EPA's proposal does nothing to advance use of the one method of electronic submission that arguably imposes the least burden on regulated entities.

<sup>9</sup> EPA solicits comments on whether Part 3 should include a specific cross-reference to the required *Federal Register* announcements and other guidance or instructions for specific programs. 66 Fed. Reg. 46168. Although UARG believes such a codification is necessary to adequately reflect the law, it is unlikely to resolve issues of uncertainty given the amount of time required for updating the C.F.R.

respect, EPA's proposal would govern reporting primarily by placing requirements on the systems that receive documents. 66 Fed. Reg. 46165. Although UARG supports EPA's determination not to specify particular technology for submission of records, UARG questions why EPA would remove the flexibility currently available to EPA, states, and regulated entities by requiring submission of documents to specific systems. The requirement for "designation" of specific systems could prohibit use of less formal procedures -- like electronic mail submission -- that are already in place. As described above, EPA has previously determined that use of electronic mail is sufficient for submissions under certain circumstances, and in at least one of those circumstances, included a reference to electronic mail in its rule.

EPA's proposed rule does not codify any details of how CDX operates or how it is constructed.<sup>10</sup> Instead, EPA plans to provide details regarding CDX in the final rulemaking notice. 66 Fed. Reg. 46169. EPA does, however, propose to place some requirements on any future modifications of CDX that could cause disruption for regulated entities. Specifically, EPA proposes to "provide public notice and seek comment ... at least one year in advance of the proposed implementation" date. Proposed § 3.20(a)(1). UARG notes that while notice at the time of proposal is important, the more important lead-time is from EPA's final determination on whether to proceed with the change. As a result, UARG requests that (if EPA finalizes such an approach), EPA codify in the rule a requirement to provide lead-time of at least 6 months from the time of any final decision before implementing any changes (including changes in the "format" that is acceptable for submission) and that EPA commit to solicit comment in individual cases to determine whether a longer lead-time is necessary.<sup>11</sup> Otherwise, entities could be required to use their lead-time and resources to implement changes based on a proposal which could change as a result of comments.

Subpart C establishes the requirements for acceptable "electronic records" by defining criteria for "electronic record-retention systems," including requirements to use "secure, computer-generated, time-stamped audit trails that automatically record the date and time of operator entries and actions that create, modify, or delete electronic records or documents." Proposed § 3.100. The nine proposed criteria would apply to any records in "electronic form" that are "created, modified, maintained, archived, retrieved, or transmitted by" a regulated entity under "any" recordkeeping requirement of an EPA program. Proposed § 3.1(b). According to EPA, the criteria are intended to ensure that the records are "trustworthy and reliable," "available to EPA," and "admissible as evidence in a court of law to the same extent as a corresponding paper record." 66 Fed. Reg. 46169 (emphasis added). However, EPA does not explain how the

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<sup>10</sup> EPA also fails to provide any details regarding what an "alternative system" might be and whether EPA would designate any of their current systems as acceptable. UARG assumes that EPA intends CDX and any alternative systems to meet the same onerous criteria proposed for EPA-approved state programs under Subpart D.

<sup>11</sup> UARG has been seeking similar commitments from EPA under the Acid Rain Program, where EPA has so far refused to use rulemaking procedures to establish the required electronic formats and instructions. UARG members have had to (and continue to) spend significant time and resources complying with EPA changes to un-codified electronic format and submission requirements.

proposed requirements, particularly the “audit trail” requirements, are consistent with requirements applicable to “corresponding paper records,” which do not have such specific criteria attached to their retention. Moreover, not all records kept under EPA programs are intended to be cast in stone for the full retention period. For example, QA/QC Plans developed under the Acid Rain Program are intended to be living documents that may be adapted to changes in circumstance, and must be revised in response to changes in rule requirements. EPA’s one size fits all approach to electronic records fails to address these distinctions.

Subpart D sets out the proposed criteria for electronic reporting and recordkeeping under EPA-approved state programs. Entities submitting documents to states would satisfy the requirements of EPA’s proposal (1) by successfully “submitting” the report to an “acceptable electronic document receiving system” under proposed § 3.2000, and (2) for any document required by rule to bear a signature when in paper format, by including an “electronic signature” meeting EPA’s proposed criteria. Proposed § 3.1000(b). Unlike the rule for CDX, EPA’s proposed rule contains specific performance criteria that must be met by states’ receiving systems, including (among other things) requirements for safeguards “sufficient to prove” in an enforcement proceeding or other litigation (1) that the submitted document was not “altered in transmission or at any time after receipt,” (2) that the document was submitted “knowingly,” and (3) for signed documents, that the document was “actually submitted by the authorized signature holder and not some other person.” Proposed § 3.2000(b). As with the criteria for electronic records, EPA does not explain (1) how these criteria relate to existing requirements for paper submittals, which generally do not include the same types of “evidentiary” safeguards, or (2) why other, less onerous methods of submission, such as transmittal by electronic mail (or use of digitized signatures) would not be sufficient for some submittals.

Similar to the requirements under the Acid Rain Program, proposed CROMERRR would require entities to register with EPA prior to submitting electronic documents. Proposed 3.2000(d). However, unlike the Acid Rain Program, CROMERRR equates physical submittal with the “signing” or “certifying” of a document, thus limiting the people who can actually submit signed documents under some programs to designated officials like the DR under the Acid Rain Program, or the RO under Title V. CROMERRR even goes as far as prohibiting the affixing of the digital signature until the “signatory” has been provided the opportunity to review all of the data transmitted in an “on-screen visual format.” Proposed § 3.2000(e). Because the officials required to “sign” documents under EPA programs are often high level managers or executives, requiring those officials to “actually submit” the document, or to review submitted information on-line, in almost all cases, would not be consistent with current practices and would be problematic from a technical standpoint (much like requiring the signing official to personally affix the postmark).<sup>12</sup> Moreover, where submittals involve significant amounts of data, such as emissions values, requiring anyone to review the data on-line is unreasonable. Again, EPA does not explain why other options for verification of these submittals are not sufficient, or how these

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<sup>12</sup> Although EPA’s proposal allows for registration of multiple submitters, that flexibility is meaningless if EPA also requires that the document be physically submitted by the person legally responsible for signing or certifying the document, such as the DR or RO.

stringent requirements are consistent with requirements for paper submission, which are not subject to such requirements.

To document the submission, Subpart D requires that acceptable electronic document receiving systems create transmission records of the "receipt" and store other information documenting the submission. Proposed § 3.2000(f). Under proposed CROMERRR § 3.3, the term "receive" is defined to mean the successful acquisition of an electronic document "*in a format that can be processed by the receiving system*" -- thus allowing EPA to reject receipt of any document with "formatting" errors. The term "submit" is defined to limit submission to those documents that have been "*received by the intended recipient.*" EPA's redefinition of "submit" to mean "receipt" could have a significant impact on rules, like those under the Acid Rain Program, that require electronic "submission" by a particular deadline, but make clear that compliance with the submission requirements is tied to the time and date of "transmission," not "receipt." As noted above, issues regarding availability of EPA's computer systems at the time of submission deadlines under the Acid Rain Program, as well as problems associated with EPA's rejection of submissions with formatting errors (some of which have turned out to be errors with EPA's own format checking software) have led UARG members to challenge EPA's electronic submission rule in Court. The possible effect of EPA's proposed CROMERRR definitions on UARG members' obligations under the Acid Rain Program rules only increases UARG members' concerns with and objections to this proposal.

In the final part of the proposal, EPA proposes to revise a handful of existing rules to require states that "choose" to receive electronic documents or to allow electronic recordkeeping under those rules to satisfy the requirements of Part 3. As with the proposed rules for EPA programs, this language in effect prohibits state from accepting electronic submissions until their program has been approved by EPA, or allowing electronic recordkeeping until the criteria in CROMERRR have been met. This result is particularly clear from EPA's proposed revision of 40 C.F.R. § 60.7 in the general notice and recordkeeping provisions of the NSPS -- which already authorizes "electronic notification"-- to require compliance with CROMERRR. With that revision, those notifications would no longer be authorized until the additional CROMERRR requirements were met -- thus creating (as opposed to removing ) additional costs and obstacles for use of electronic submissions under that program.

#### **IV. EPA's Proposal Is Fundamentally Flawed And Should Be Withdrawn.**

As described above, although UARG supports EPA's stated intent of removing existing obstacles to electronic recordkeeping and reporting under EPA programs, UARG believes that EPA's proposal is fundamentally flawed and should be withdrawn. The following summarizes the reasons for UARG's objections to the proposal and recommendations for further action to satisfy the GPEA.

##### **A. EPA's Proposed Rule Does Not Reflect The Agency's Stated Intent.**

EPA has an obligation under the law to provide adequate notice of the purpose and effect of its proposed rules. According to the preamble, one of the primary purposes of the rule is to remove obstacles to electronic recordkeeping and reporting as required under the Government Paperwork Elimination Act (GPEA). Consistent with EPA's assertions that the rule would not

impose costs or new requirements, EPA repeatedly states that the proposed requirements would only apply to regulated entities that “choose” to submit electronic documents and/or keep electronic record, and thus that compliance with the rule would be “voluntary.” *See, e.g.*, 66 Fed. Reg. 46163-64, 46167.

EPA’s assertions that CROMERRR would be “voluntary” are based on the erroneous assumption that regulated entities are not already creating electronic records and submitting electronic documents to EPA and states. That EPA would make that assumption is surprising given that many of their own rules, including some of the rules described above, not only already allow, but in some cases require creation, maintenances, and submission of information to EPA and states in electronic format. As EPA’s rulemaking record for CROMERRR acknowledges, EPA has for years been taking steps to encourage electronic recordkeeping and reporting, including participation in several state electronic reporting pilot projects. 66 Fed. Reg. 46166. To the extent EPA truly intended that compliance with CROMERRR be voluntary, that intent is not reflected in the proposed rulemaking language. EPA’s rule language applies CROMERRR criteria to all electronic records and documents, even those that are required under EPA rules. Anyone relying on EPA’s preamble to determine the impacts of the proposed rule would be seriously misled.

EPA’s proposed rule language also does not reflect EPA’s stated intent of removing “obstacles.” Although the rule includes language purporting to authorize use of electronic records and documents to satisfy EPA recordkeeping and submission requirements, the rule also establishes criteria that create “obstacles” to such practices by imposing costs and burdens that do not currently exist. In that vein, several statements in EPA’s preamble suggest that EPA’s proposal is directed less at reducing burdens imposed on regulated entities by paperwork requirements than at finding ways to reduce the ordinary evidentiary burdens imposed on EPA during enforcement actions. *See, e.g.*, 66 Fed. Reg. 46171. That EPA might want to promulgate regulations that facilitate its ability to satisfy evidentiary rules in enforcement actions is not surprising (whether directed at paper or electronic records). What is surprising is that EPA would attempt to do so under the guise of a rule designed to reduce (not increase) paperwork burdens for regulated entities.

Although EPA may have a duty to ensure that electronic records and submissions are not less trustworthy than paper records and submissions, EPA should not attempt to use this rule as a means to resolve unrelated enforcement concerns or evidentiary issues. Contrary to EPA’s suggestion, electronic records and reporting are already governed by the same federal laws regarding falsification of information submitted to the government as paper records, and no special rules are required to provide EPA the authority (or evidence) necessary to prosecute fraudulent electronic submissions or recordkeeping to the fullest extent of the law. 66 Fed. Reg. 46164. Significantly, EPA has provided no concrete examples to support its apparent concerns regarding the reliability and authenticity of electronic records or electronic submissions (which are already in place under many EPA programs).

In short, the proposed CROMERRR is not consistent with EPA’s stated intent or EPA’s description of the rule in the preamble. If EPA wishes to engage in rulemaking to address concerns regarding fraudulent activities in recordkeeping and reporting, or desire to establish the best possible evidence for enforcement, EPA should identify the specific problems with existing

recordkeeping and reporting requirements and propose a rule more narrowly tailored to address those issues.

**B. EPA's Proposed Rule Would Unlawfully Revise Existing Rules That Require Or Allow Use Of Electronic Records and Reports.**

To the extent that EPA's proposed rule would apply to existing regulations that (explicitly or implicitly) require, or already allow, the use of electronic records or submission of electronic documents, EPA's proposal constitutes an unlawful proposal to revise those rules. When EPA promulgates a regulation, including requirements for recordkeeping and reporting, EPA is required to meet certain substantive and procedural requirements. Under the Clean Air Act, for example, EPA is required to include in the proposal a statement of basis and purpose that includes the factual data upon which the rule is based, and any major legal interpretations and policy considerations underlying the proposed rule. CAA § 307(d). Similar requirements apply under other environmental statutes and the Administrative Procedure Act. In addition, EPA is required under legislation and executive order to analyze, consider, and report on the costs, benefits, and burdens of its proposed rule (or rule revision) on regulated entities, small businesses, and states.<sup>13</sup>

Although CROMERRR itself does not mandate electronic recordkeeping and reporting, CROMERRR would alter the status of existing electronic recordkeeping and reporting provisions under other EPA rules that are subject to CAA or other administrative requirements. Specifically, CROMERRR would impose significant costs and burdens under rules that already mandate electronic recordkeeping and reporting and would result in lower "cost-savings" under rules that specifically authorize those practices. In order to apply the requirements in EPA's CROMERRR proposal to electronic recordkeeping practices or electronic submissions that are already required or authorized under existing rules, EPA must both explain the basis for addition of those new requirements to those existing rules, and consider the impact of those new requirements on the costs, benefits, and burdens of those existing rules. As is clear from the Agency's discussions and certification in the CROMERRR proposal, 66 Fed. Reg. 46185-87, EPA has not complied with those requirements.

To the extent EPA did considers the "costs" of its proposed rule, EPA based its analysis on the erroneous assumption that compliance with the rule -- and any costs associated with that compliance -- would be "voluntary." When EPA reviewed Information Collection Requests (ICRs) for existing EPA rules as part of its analysis, EPA did so only to estimate potential cost "savings" associated with CROMERRR. Thus, EPA explicitly limited its review of ICRs to programs that do not already have electronic reporting in place. CROMERRR Cost-Benefit Analysis (March 2001), II-A-039, at A-1. Although UARG does not have a detailed analysis of the costs associated with bringing existing electronic recordkeeping and reporting into compliance with the proposed CROMERRR criteria, those costs would be substantial and

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<sup>13</sup> See, e.g., Executive Order 12866; Executive Order 13132; Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*; Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*; and Unfunded Mandates Reform Act (UMRA), Public Law 104-4.



cannot be ignored.<sup>14</sup> EPA's failure to consider those costs in the CROMERRR rulemaking is a fundamental flaw that prevents promulgation of the rule as proposed.

To prevent unlawful revision of existing rules, EPA would, at a minimum, have to revise CROMERRR to exempt from its requirements any electronic recordkeeping or reporting mandated or authorized under existing rules -- such as the requirements under the Acid Rain Program and NSPS rules described above. Although EPA has suggested that its rules include a provision for "carving out" such requirements,<sup>15</sup> UARG has found no procedure or section in the proposed rule to list such exceptions. Moreover, identifying and listing all of the existing provisions for electronic recordkeeping and reporting would be a difficult task and one that cannot be imposed on commenters. UARG believes that the responsibility to identify such exceptions -- and to ensure the lawfulness of its proposed rule -- falls on EPA, and not on the regulated community.

**C. EPA's Proposed Criteria Would Impose Unreasonable Costs And Burdens On Future Use Of Electronic Recordkeeping And Reporting.**

Even if CROMERRR were truly "voluntary" -- i.e., EPA redrafted the rule to exempt from CROMERRR any existing electronic recordkeeping and reporting requirements or provisions -- the proposed rule likely would not result in significant increases in use of paperless technologies. As drafted, the rule is so burdensome and inflexible that it would provide little (if any) of the overall burden reduction or cost savings necessary to encourage continued or future use of electronic recordkeeping and reporting.

EPA has already heard testimony and received numerous comments outlining the burdens associated with implementing its rule as proposed. If EPA finalized CROMERRR, companies that are voluntarily creating electronic records, or voluntarily making electronic submissions, would likely stop (to the extent possible) rather than attempt to comply.<sup>16</sup> Compliance with the CROMERRR criteria would not only require purchase and maintenance of complex and expensive computer systems for data management and retention (and result in creation of volumes of additional electronic records by "audit trail" programs), it likely would also require significant changes in internal practices and procedures with respect to recording and certifying information.

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<sup>14</sup> Based on UARG's experience in procuring and implementing DAHS software to meet the existing electronic recordkeeping and reporting requirements for the Acid Rain Program (which do not include "audit trail" or digital signature requirements like those in CROMERRR), UARG believes the software cost estimates in EPA's Cost-Benefit Analysis (which EPA acknowledges are already "significant," CROMERRR Cost-Benefit Analysis at 3-7) are likely underestimated.

<sup>15</sup> Transcript, Public Meeting on Establishment of Electronic Reporting; Electronic Records, October 29, 2001, IV-F-001, at 29-30.

<sup>16</sup> Even if companies were inclined to comply, determining what is necessary for full compliance would be a difficult task requiring a full review of existing company systems and resolution of numerous questions regarding interpretation of EPA's definitions and criteria.

Although companies must have systems in place to ensure the reliability and integrity of their data, and to support “signatures” and “certifications,” those systems are allowed to take into account the relative importance of the data and the risks of compromise. EPA’s CROMERRR removes that flexibility and requires that the least significant record or document be treated the same as the most highly sensitive. Although UARG appreciates EPA’s attempts to provide some clarification of its intent with respect to the scope of the rule,<sup>17</sup> those clarifications do not resolve the issues identified by industry. If EPA truly wishes to encourage electronic recordkeeping and reporting, EPA should withdraw its proposal and work with companies to consider other, more flexible options that would satisfy the goals of both EPA and the regulated community.

**D. EPA’s Proposal Is Not Consistent With The GPEA.**

As noted in EPA’s preamble and Cost-Benefit Analysis, the CROMERRR proposal was drafted in part to satisfy Congressional mandate under the “Government Paperwork Elimination Act of 1998” (GPEA), 44 U.S.C. 3504, P. L. 105-277. The GPEA directed the Office of Management and Budget (OMB) to develop procedures for the “use and acceptance of electronic signatures by Executive agencies.” With respect to implementation, the GPEA directed OMB to ensure that Executive Agencies (including EPA) provide within 5 years (*i.e.*, by October 21, 2003) for the option of the electronic maintenance, submission, or disclosure of information, when practicable as a substitute for paper, and for the use and acceptance of electronic signatures when practicable. GPEA § 1704.

In May, 2000, OMB issued the required final “Procedures and Guidance” for implementation of the GPEA. 65 Fed. Reg. 25508. In that guidance, OMB reminded agencies of the GPEA’s mandate that:

... electronic records and their related electronic signatures are not to be denied legal effect, validity, or enforceability merely because they are in electronic form.

*Id.* at 25510 (emphasis added). Consistent with that directive, and the criteria established by Congress,<sup>18</sup> OMB explicitly rejected a “one size fits all” approach, *id.* at 25510, and directed that agencies’ assessments:

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<sup>17</sup> For example, at the January 17, 2002, public meeting on electronic recordkeeping issues under CROMERRR, EPA indicated that its intent was to apply the electronic recordkeeping requirements only to records kept in “electronic recordkeeping systems,” and not to any record involving computers. *See* EPA Overhead Presentation from January 17, 2002 Public Meeting.

<sup>18</sup> Congress directed that the procedures for electronic signatures (A) be compatible with standards and technology “generally used in commerce,” (B) not “inappropriately favor one industry, (C) ensure signatures that are ... as reliable as is appropriate for the purpose in question and keep intact the information submitted, (D) provide for electronic acknowledgement of electronic forms that are successfully submitted, and (E) to the extent feasible and appropriate,

(continued...)

... weigh costs and benefits and involve an appropriate risk analysis, recognizing that low-risk information processes may need only minimal consideration, while high-risk processes may need extensive analysis.<sup>19</sup>

Equally significant, OMB did not direct agencies to promulgate rules defining criteria for acceptable records and reports. Instead, OMB directed agencies to develop a plan and schedule for implementing "optional" electronic recordkeeping and reporting. *Id.* at 25513. While OMB's Guidance acknowledged that to implement a plan under the GPEA, agencies would need to remove existing "impediments to electronic transactions," including, "if necessary, amending regulations or policies," *id.*, the Guidance said nothing about promulgating entirely new regulations -- like the proposed CROMERRR -- that are designed not just to preserve, but to improve, the evidentiary value of electronic documents in enforcement actions.

In short, nothing in the GPEA or OMB's guidance encouraged or authorized the type of rule proposed by EPA. To the contrary, by requiring that records under existing electronic recordkeeping requirements meet the proposed criteria and by establishing a "one-size fits all" approach to approving future electronic records and reports, EPA's CROMERRR violates the intent of the GPEA and the risk analysis guidance provided by OMB.

**E. EPA Should Withdraw Its Proposal In Favor Of A More Flexible Approach Consistent With The GPEA.**

For the reasons described above, EPA should withdraw its current CROMERRR proposal and begin the process of considering alternative approaches to comply with the GPEA. Consistent with OMB Guidance, EPA's primary objective in the short term should be to meet the mandate of the GPEA by identifying and revising (if deemed appropriate) rules, policies, and guidance that currently present impediments to electronic recordkeeping and reporting. The fact that EPA has already identified and revised (or proposed to revise) some such provisions in the NSPS and Acid Rain Program rules, described above (and done so without imposing CROMERRR-like criteria), illustrates that the task is not as impossible or ill-advised as EPA suggested in its rulemaking docket. *See, e.g.,* II-D-005.

To further implement options for electronic reporting, EPA should (working with companies and states) perform the required risk analysis to identify and implement policies for use of "digital signatures" and related systems "as appropriate" for various types of submissions. In this analysis, EPA should draw upon the experiences of its own program offices, as well as other agencies, that are currently employing a wide range of electronic reporting procedures.

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require agencies anticipating large numbers of submittals to ensure that "multiple methods of electronic signatures" are available. GPEA § 1703.

<sup>19</sup> *Id.* at 25512. For example, OMB's Guidance explicitly recognized that "[s]etting up a very secure, but expensive, automated system may in fact buy only a marginal benefit of deterrence or risk reduction over other alternatives and may not be worth the extra cost." *Id.* at 25515.

Where security issues are relatively small, EPA could implement additional programs for submission of documents by electronic mail relatively quickly. Where submissions are deemed to require a higher level of security, EPA should identify a range of options taking into account not just the enforcement issues that are the focus of the proposed CROMERRR criteria, but also the practical and technical issues associated with implementing the signature requirement under various programs and at facilities with various levels of technical expertise.

With respect to recordkeeping, EPA should begin by recognizing the extent to which regulated entities are already legitimately maintaining records and submitting information to EPA and states in electronic formats. EPA should then work with companies and states to identify whether any additional regulatory safeguards are truly necessary and appropriate to further ensure reliability and integrity of that information commensurate with paper records.